

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-01789-smb

4 Adv. Case No. 10-04446-smb

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6 SECURITIES INVESTOR PROTECTION CORPORATION,

7 Plaintiff,

8 v.

9 BERNARD L. MADOFF INVESTMENT SECURITIES, et al.,

10 Defendants.

11 - - - - - x

12 IRVING H. PICARD TRUSTEE FOR THE LIQUIDATION OF BERNARD L.

13 MADOFF INVESTMENT SECURITIES LLC,

14 Plaintiff,

15 v.

16 TRUST UNDER AGREEMENT DATED 12/6/99 FOR THE BENEFIT OF

17 WALTER AND EUGENIE KISSINGER, ET AL.,

18 Defendants.

19 - - - - - x

20 U.S. Bankruptcy Court

21 One Bowling Green

22 New York, NY 10004

23 July 6, 2016

24 10:15 AM - 10:50 AM

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1 B E F O R E :
2 HON STUART M. BERNSTEIN
3 U.S. BANKRUPTCY JUDGE
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1 Hearing re: Discovery Conference re Deposition of Aaron
2 Blecker for Profit Withdrawal Proceeding

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4 Hearing re: Discovery-Related Matters (applies to various
5 additional adversary proceedings as set forth in letters
6 dated 5/24/16 from Chaitman LLP)

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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3 CHAITMAN LLP

4 Attorney for Carol Nelson, Defendant

5 465 Park Avenue

6 New York, NY 10022

7

8 BY: HELEN DAVIS CHAITMAN, ESQ.

9

10 BAKER & HOSTETLER, LLP

11 Attorney for the Debtor

12 45 Rockefeller Plaza

13 New York, NY 10111

14

15 BY: EDWARD J. JACOBS

16 DAVID J. SHEEHAN

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1 P R O C E E D I N G S

2 MR. SHEEHAN: Good morning, Your Honor. David
3 Sheehan, for the trustee. I'm here on the Blecker
4 application.

5 THE COURT: Okay. Well, let me hear from Ms.
6 Chaitman first, because who wrote the first letter?

7 MR. SHEEHAN: Pardon, Your Honor?

8 THE COURT: Who wrote the first letter? Oh, you
9 wrote the first letter, I'll hear from you first.

10 MS. CHAITMAN: Shall I make my appearance now?

11 THE COURT: Yeah, sure.

12 MS. CHAITMAN: Okay. Helen Davis Chaitman, on
13 behalf of Aaron Blecker.

14 MR. SHEEHAN: Your Honor, what we seek to do here
15 today is one that out of the ordinary course. I must say I
16 don't know why I'm here. What we have here is a claimant
17 who claims he didn't get a check.

18 THE COURT: Right.

19 MR. SHEEHAN: That's it, that's the evidence,
20 that's all they have, they have nothing else. He says "I
21 didn't get it."

22 THE COURT: Okay, and you say he did.

23 MR. SHEEHAN: That's right.

24 THE COURT: So what's the purpose of taking his
25 deposition?

1 MR. SHEEHAN: The purpose of taking his deposition
2 is his truthfulness is central to his entire case.

3 What we did is we did exactly what everyone else
4 would do. Once it became clear, as Your Honor suggested,
5 and even reminded that more than once, that we should have
6 an inquiry into the facts behind this. The trustee set this
7 up as a motion --

8 THE COURT: The inquiry I suggested was more into
9 the general question of what VW meant. Obviously, I guess
10 you're free to take discovery into every individual case in
11 which someone has asserted a claim that the trustee is
12 determined to disallow.

13 But the discovery we were talking about was not
14 individual discovery. But I'm not aware of a discovery
15 deadline vis-à-vis claims determination. So let's get off
16 the timing of it, and tell me what you think Mr. Blecker,
17 who has just turned 105 --

18 MR. SHEEHAN: Correct.

19 THE COURT: -- is going to testify to that he
20 hasn't already testified to.

21 MR. SHEEHAN: I don't care if he's 25, 55, or 105.

22 THE COURT: What do you think he's going to say
23 that he didn't say --

24 MR. SHEEHAN: What he's going to say is he's going
25 to --

1 THE COURT: Let me finish.

2 MR. SHEEHAN: I'm sorry, Your Honor.

3 THE COURT: What do you think he's going to say
4 that he didn't say in his prior deposition?

5 MR. SHEEHAN: Well, he's going to answer questions
6 that we didn't ask then.

7 THE COURT: Why didn't you ask them?

8 MR. SHEEHAN: Because it was a week after Your
9 Honor suggested that we take it. We hadn't done any
10 discovery, we had not done document demands, we had not done
11 interrogatories, we had not done request for admissions.

12 In those request for admissions and document
13 demands, he has contradicted statements he has made in
14 writing.

15 THE COURT: Well, then you'll just show that at
16 the hearing, and maybe --

17 MR. SHEEHAN: Your Honor, I'm suggesting that I
18 don't get to take this man's deposition before because he's
19 105?

20 THE COURT: No.

21 MR. SHEEHAN: There's no other reason not to allow
22 this.

23 THE COURT: All right, all right.

24 MR. SHEEHAN: Really isn't.

25 THE COURT: Okay.

1 MR. SHEEHAN: He's contradicted himself. He's
2 contradicted himself at the deposition. He couldn't
3 remember the names of people at the deposition, but he
4 remembers whether he got a check or didn't get a check. And
5 Your Honor's suggesting that this is not a fertile field for
6 a deposition?

7 THE COURT: No, I'm not. Let me hear from Ms.
8 Chaitman.

9 MS. CHAITMAN: Your Honor, you had originally
10 suggested that we preserve his testimony. We set a date for
11 the deposition. The trustee's counsel was present. He
12 chose not to ask any questions. He didn't request to
13 continue the deposition. The trustee's counsel never
14 requested to continue the deposition.

15 Mr. Blecker is now 105 years old. The discovery,
16 with respect to the profit withdrawal issue, had closed and
17 it was extended simply based on Your Honor's urging that the
18 trustee speak to the Madoff employees who had handled the
19 profit withdrawal transactions. That was the reason for the
20 extension of the discovery. Normally, Your Honor --

21 THE COURT: Well, but this really goes to his
22 individual claim determination. There is this kind of
23 larger issue of what PW means, without regard, necessarily,
24 to any particular claimant, and I'm not going to hear
25 testimony at that hearing, claimants coming up and saying,

1 "I didn't get anything." I'll hear that, I guess, when the
2 time comes for the claim determination.

3 MS. CHAITMAN: But the thing is, when you take a
4 deposition, your adversary has an obligation to come and ask
5 questions. He can't wait three and half years later, and
6 all of a sudden think of a question. And in addition, Your
7 Honor, we're dealing with a man who's 105 years old. I
8 don't want him to die over this.

9 THE COURT: Can I ask you a question? There was
10 an exhibit marked at his deposition, a declaration. What
11 declaration was that? Do you remember?

12 MS. CHAITMAN: It was the declaration that had
13 been filed with the Court a few days -- within a couple of
14 weeks before we argued, and Your Honor made the request that
15 his testimony be preserved.

16 THE COURT: Was it the declaration that he signed
17 on April 29th, 2014?

18 MS. CHAITMAN: I believe that it was, Your Honor.

19 THE COURT: All right, thank you. I'm not going
20 to permit you to take Mr. Blecker's deposition.

21 On April 19th, 2014, he submitted a declaration
22 which squarely put into issue the question of his profit
23 withdrawals, and whether he had ever received anything.
24 Over two months later -- what was the date of his
25 deposition? More than two months later, you take his

1 deposition, or you defend his deposition.

2 Ms. Chaitman takes it at my suggestion, because at
3 that time he was 103, to preserve his testimony. He says,
4 "I didn't receive any withdrawals."

5 Now, you know, I mentioned the last time that
6 there are things about that testimony that scream a little
7 credibility, or credulity, but you had the opportunity to
8 take his deposition at the time. He was 103, what were you
9 reserving questions for?

10 He's going to testify that he didn't receive
11 anything. If you have any contrary evidence that he did,
12 you can bring it forward. But there's no need --

13 MR. SHEEHAN: Could I --?

14 THE COURT: -- to take his deposition. He's been
15 deposed, you had the opportunity to cross-examine him. The
16 issue of what he withdrew was upfront in a declaration that
17 he submitted two months before, so you had all the
18 information you needed. Anything else on this?

19 MR. SHEEHAN: I object.

20 THE COURT: Okay.

21 MR. SHEEHAN: Your Honor --

22 THE COURT: You can submit an order. Next?

23 MS. CHAITMAN: If you'd like, Your Honor, I can
24 start. We're here on the ever-arising issue of the bank
25 subpoenas.

1 THE COURT: The never-ending, I would say.

2 MS. CHAITMAN: Yes, you're right, the never-ending
3 issue.

4 When I was here before Your Honor in April, we had
5 a colloquy that wasn't on the calendar, but we had a
6 colloquy on the record, and Your Honor indicated that if the
7 defendants would submit an affidavit consenting to the years
8 on Exhibit B that were at issue in the subpoena, that --

9 THE COURT: Are these the two-year or the three-
10 year subpoenas, all of them?

11 MS. CHAITMAN: Well, this has what's happened, if
12 I may, just to explain it.

13 THE COURT: Right.

14 MS. CHAITMAN: Based on what Your Honor stated, I
15 then submitted for the then-pending subpoenas -- of course,
16 it's multiplied enormously. For the then-pending subpoenas,
17 I submitted affidavits from each of my clients. Some of
18 them said "We consent for five years to Exhibit B," some
19 said, "We consent for two years." It varied.

20 THE COURT: The question, though, vis-à-vis the
21 subpoenas, is a lot of them were two year; two year before
22 the petition and one year after.

23 MS. CHAITMAN: Now they go from 1998.

24 THE COURT: Okay.

25 MS. CHAITMAN: They cover an entire period.

1 THE COURT: Fine.

2 MS. CHAITMAN: So my understanding of what Your
3 Honor had ruled, and perhaps I've misunderstood, was that
4 for the years in which the clients acknowledged Exhibit B as
5 accurate, there can't be a bank subpoena served.

6 THE COURT: Can I ask a question because it was
7 raised in one of the letters? In acknowledging the
8 accuracy, did they also acknowledge that they received the
9 transfer?

10 MS. CHAITMAN: Yes, there's deposits and
11 withdrawals. It didn't say that, but I--

12 THE COURT: Okay, would this be resolved -- this
13 part of it be resolved by you simply submitting consent
14 orders, assenting orders on the record that deems all of the
15 deposits to have been made, and all the withdrawals to have
16 been taken and received for the years that they agreed to?

17 MR. JACOBS: I don't believe --

18 THE COURT: I know there are other issues, but
19 let's deal with that one first.

20 MR. JACOBS: Right. There are -- it's not an easy
21 answer, Your Honor, because it's unclear -- it's clear that
22 the defendant is not acknowledging receipt of the two-year
23 transfers, which is an issue -- a disputed issue of
24 discovery.

25 THE COURT: But if they're acknowledging that

1 they've received --

2 MR. JACOBS: The affidavits only acknowledge that
3 for a certain specified year that the customer statements
4 are accurate. I, Your Honor, don't know what that means. I
5 don't know if that means the defendants received the
6 transfers, they made the deposits --

7 THE COURT: But that's why I'm asking the question
8 on this issue. Maybe this can just be resolved with an
9 order that says that for the period they admit -- I'm just
10 looking at Russell Oasis, he admits that from 2000 on,
11 Exhibit B is accurate.

12 Can this part of it simply be resolved by an order
13 that says that the deposits and withdrawals that appear on
14 the statement, this particular occasion, 2000 on are deemed
15 to be -- the deposits have deemed to have been made to BLMIS
16 and the withdrawals are deemed to have been taken and
17 received by the defendant. And that's all it says.

18 MR. JACOBS: Unfortunately, it's not that simple,
19 Your Honor --

20 THE COURT: Why not?

21 MR. JACOBS: Because many of the customer
22 statements also have inter-account transfers, for example,
23 which our allegation is there weren't actually deposits nor
24 withdrawals, it was a fictional bookkeeping entry.

25 THE COURT: I understand that. But you're not

1 suing based on inter-account transfers.

2 MR. JACOBS: Well, the inter-account transfer,
3 depending on how we treated the principal cash balance of
4 the related account, can affect the net equity calculation
5 of the sued-upon account. So it's very relevant to whether
6 --

7 THE COURT: I don't know how they could admit
8 that. That's a third party transferring -- for all they
9 know, a third party makes a transfer to the account.

10 MR. JACOBS: Right. But Your Honor, Ms. Chaitman
11 is submitting on behalf of her client's very loose language
12 that talks about the accuracy of statements that could later
13 be interpreted to, you know, as a gotcha, well, you know,
14 you have to now -- you have to now live with our contention
15 that there was a \$3 million inter-account transfer made to
16 this account, contrary to our Exhibit B in our complaint,
17 contrary to our allegations in the complaint, and contrary
18 to our principal cash balance.

19 So the issue is the defendant, in our view, needs
20 to say that the Exhibit B attached to the trustee's
21 complaint is 100 percent accurate and correct, both with
22 respect to all of the deposits and withdrawals, and with
23 respect to the trustee's calculation of the principal cash
24 balance, and with respect to the defendant's receipt of the
25 two-year transfers that were allowed to recover under the

1 relevant law.

2 None of these affidavits come even close to doing
3 that, so we believe we have an absolute right to this
4 discovery, and this isn't even taking into account the issue
5 of the affirmative defenses, which none of Ms. Chaitman's
6 clients have --

7 THE COURT: Stop. How would any of these
8 defendants' banks have records of transfers from one BLMIS
9 account to another BLMIS account?

10 MR. JACOBS: They wouldn't because -- they
11 wouldn't. And I'm not saying that we're seeking that
12 discovery from the banks, but it would show that there was
13 never any deposit made from the defendant, that's for
14 example.

15 THE COURT: But I recall that -- I don't have the
16 statements in front of me -- you had specific columns that
17 showed deposits and withdrawals and I know that there are
18 notations regarding inter-account transfers.

19 MR. JACOBS: Right.

20 THE COURT: But I don't know how you insist that a
21 defendant admit that an inter-account transfer occurred or
22 that the real value of that transfer was in some amount.

23 MR. JACOBS: I'm not asking, I'm not saying in
24 every situation that the bank needs to do that.

25 THE COURT: But it's not nothing to do with the

1 bank discovery. We're talking about bank discovery.

2 MR. JACOBS: Okay. But what you're proposing --
3 what you -- forgive me if I misunderstood what you proposed.
4 I understood your proposal to be if there were an order
5 testifying to the accuracy of the customer statements, that
6 should be suffice -- that would theoretically be sufficient,
7 and I'm responding to Your Honor's question by saying it's
8 not because the customer statements are -- don't just
9 reflect deposits and withdrawals.

10 THE COURT: All right. So what's the defendant's
11 position -- You know, for instance, let me go back to Mr.
12 Oasis's affidavit or declaration. He says, "I stipulate the
13 deposits and with withdrawals from 2000 are as represented
14 in Exhibit B." Does that include the trustee's valuation of
15 inter-account transfers? I don't know if there's one in
16 that case

17 MS. CHAITMAN: There aren't any inter-account
18 transfers in that particular account, and the inter-account
19 transfers are generally much earlier, and anyone would have
20 bank records.

21 THE COURT: Okay.

22 MS. CHAITMAN: If we're focusing simply on the
23 bank records, what I thought we were trying to do -- and if
24 my wording wasn't satisfactory, the trustee could have
25 suggested something differently -- but I'm not consenting to

1 judgment against the client.

2 THE COURT: Right.

3 MS. CHAITMAN: I'm simply saying that for whatever
4 period each affidavit deals with, you're not entitled to the
5 bank records, because there's no factual issue as to those
6 deposits and withdrawals.

7 THE COURT: But do they also consent, for the
8 period they agree, that the inter-account transfers, as
9 reflected, are accurately reflected?

10 MS. CHAITMAN: No, they can't do that, because the
11 transferor account was a different person, and they have no
12 knowledge of it.

13 MR. JACOBS: But, so --

14 THE COURT: Stop. So, when Mr. Oasis, for
15 example, or some of the others, agree that the deposits are
16 accurately reflected, that does not include inter-account
17 transfers.

18 MS. CHAITMAN: But there are no inter-account
19 transfers.

20 THE COURT: Well, that's what I'm asking you.

21 MS. CHAITMAN: But for this period, Your Honor,
22 that's what I'm saying, there are very few inter-account
23 transfers --

24 THE COURT: Okay.

25 MS. CHAITMAN: -- for the -- we're talking about

1 the last several years of Madoff's operation.

2 THE COURT: All right. Let me rephrase what I
3 said. During the period that they agree that the records
4 accurately reflect the deposits and the withdrawals, does
5 that agreement include any inter-account transfers during
6 that period?

7 MS. CHAITMAN: I don't have every affidavit in my
8 mind, but I do not believe that it does, because it's only
9 the last two to four years, except Mr. Oasis went back to
10 2000.

11 THE COURT: All right.

12 MS. CHAITMAN: But I don't believe that there are
13 inter-account transfers within this period, and I don't
14 think the bank subpoenas would reveal any evidence of an
15 inter-account transfer.

16 THE COURT: That, I agree. I agree. Look, what I
17 said repeatedly was that if they would agree that they got
18 the withdrawals -- I was focusing on withdrawals, but I
19 guess made the deposits that are indicated, certainly for
20 the periods covered by the subpoena, and I understand that
21 the subpoenas are now reaching -- going farther back, that
22 they don't have to produce bank records just on that issue
23 if they admit that they've got the deposits and the
24 withdrawals. I realize that there are affirmative defenses
25 and things like that.

1 MR. JACOBS: Right.

2 THE COURT: We'll address that in a minute. But
3 it seems to me, for what the bank subpoenas were looking
4 for, if they admit that the deposits and the withdrawals
5 during the period they acknowledge are accurate, subject to
6 possible exceptions for inter-account transfers, which I
7 didn't expect them to be in a position to admit, then that
8 satisfies that aspect of the bank subpoena.

9 MR. JACOBS: Well, Your Honor, from our
10 perspective we don't -- legally our position is we don't
11 need the bank records to prove any aspect of our case. The
12 BLMIS records we have and that we produced to Ms. Chaitman
13 in every single one of these cases together, as verified by
14 the JP Morgan account records for BLMIS accounts, which show
15 the account balance activity --

16 THE COURT: You're sure going through a lot of
17 effort to get the records if you don't need them.

18 MR. JACOBS: Well, Your Honor, Ms. Chaitman is
19 contesting the accuracy of our records. And Your Honor has
20 not yet ruled on whether our proofs are sufficient. So we
21 would be committing malpractice if we didn't aggressively
22 pursue, given Ms. Chaitman's challenge to our records, the
23 bank records from the defendant, which I might add, the
24 defendant's had an obligation to preserve at a minimum, when
25 they filed their claims back in 2009 and most of them did.

1 So I'm not saying we're going to get life of the
2 account bank subpoena bank records for each defendant in
3 every single case. Most of the banks are telling us they
4 only have some limited subset of those documents for the
5 life of the account. But I'm entitled to at least try.
6 Because if I can't get them, I also have a potential
7 spoliation argument that, in a worst-case scenario, I'm
8 entitled to make, because that may entitle me to an adverse
9 inference as to the defendant's challenge to my proofs.

10 THE COURT: I think we're talking about two
11 different things.

12 MR. JACOBS: Okay.

13 THE COURT: Ms. Chaitman says, and this can be
14 embodied in an order in each case, a brief order, which you
15 can send on notice, or submit a consent order, that the
16 client -- I'm sorry, the defendant acknowledges that the
17 deposits listed in whatever column it was, and the
18 withdrawals listed in whatever column it is, for the years
19 that they're willing to admit, were actually made, in the
20 case of deposits, or withdrawals were made and received for
21 the years -- you know, you're not going to get an agreement
22 about inter-account transfers, and there's nothing in the
23 bank records.

24 MR. JACOBS: I'm not asking for one, Your Honor, I
25 only based --

1 THE COURT: So why doesn't that resolve the bank
2 subpoena issue as to these people?

3 MR. JACOBS: Because it's still -- I guess if it's
4 worded correctly, the defendant would also admit receipt of
5 the relevant withdrawals. But also --

6 THE COURT: But she's prepared to do that, or I'll
7 sign an order to that effect, unless she tells me she --

8 MR. JACOBS: Well, Your Honor, you've invited that
9 --

10 MS. CHAITMAN: We've been doing that, Your Honor,
11 for specific years.

12 THE COURT: Well, you know, I remember some of the
13 responses to the requests for admission. You said that
14 withdrawals were made, but you didn't receive them and that
15 --

16 MS. CHAITMAN: But since then we've been giving
17 affidavits for different years, depending on the client.

18 MR. JACOBS: The affidavits don't go anywhere near
19 that bar of what Your Honor just suggested.

20 THE COURT: But I just said I would enter an order
21 that said that, unless Ms. Chaitman says, "No, I don't
22 agree," and then we can return to the bank subpoenas.

23 MS. CHAITMAN: No, I do agree. I do --

24 THE COURT: All right, fine. So in each of these
25 cases, submit an order, proposed order or settle a proposed

1 order, if Ms. Chaitman won't consent, to the effect that the
2 defendant admits that the deposits reflected in such-and-
3 such account for such-and-such years is accurate, and that
4 the withdrawals, which she admits they received, are
5 accurate for such-and-such year.

6 MS. CHAITMAN: Can we do this in all of my cases?
7 It's 94 separate cases. I have the same issue in every
8 case.

9 THE COURT: Well, if it's the same issue, and
10 you're willing to admit that the deposits were made, your
11 receipts were received, other than this possible inter-
12 account transfer issue, why doesn't that solve everything?

13 MS. CHAITMAN: And then the trustee would not be
14 permitted to subpoena bank records.

15 THE COURT: Well, wait, you'd still have an issue
16 of the bank records for the defenses. But that's something,
17 that's easier to deal with.

18 MR. JACOBS: Your Honor, we're willing to
19 entertain an order on a case-by-case level, because every
20 case is different, but Ms. Chaitman has asked for this order
21 prospectively.

22 THE COURT: I'm not going to sign a blanket order.
23 Why don't you do this? Why don't you provide the proposed
24 orders to Ms. Chaitman, three cases which trigger this
25 issue.

1 MR. JACOBS: I believe there were six, Your Honor.

2 THE COURT: Whatever the number was. I don't
3 know, I'm looking at three exhibits, I thought. Okay,
4 whatever the number is. I mean, I guess you can do it in
5 one if they're all the same. And if you can agree on the
6 language, fine. If not, you'll come back, we'll figure out
7 the language, and I'll just sign the orders for all the
8 cases.

9 MR. JACOBS: Your Honor, I would normally be very
10 happy to do that. My only reservation is that we have
11 already been doing this with Ms. Chaitman for over six
12 months, we've provided --

13 THE COURT: I said I would sign an order, though.
14 She has to object to a specific order.

15 MR. JACOBS: Okay, so we will prepare that order.

16 THE COURT: And if the objection is such that it
17 doesn't sound like the defendant is really admitting
18 anything, which is what this is about --

19 MR. JACOBS: Right.

20 THE COURT: Then we'll go back to the subpoenas,
21 that's all.

22 MR. JACOBS: Okay.

23 MS. CHAITMAN: But Judge, the whole purpose in
24 this exercise is because we believe that the trustee has
25 been subpoenaing the bank records in order to identify

1 subsequent transferees. So if we have this procedure, and
2 then Your Honor nevertheless gives the trustee the right to
3 subpoena and to use bank records for the years that are
4 covered by the stipulation, then we've accomplished nothing.

5 THE COURT: Why would I do that, except for the
6 possibility of defenses, why would I do that?

7 MS. CHAITMAN: Well, but I think we need to iron
8 out what defenses would require production of the subpoenas
9 because otherwise, why would we --

10 THE COURT: They're your defenses, and the simple
11 thing is you, the bank will produce or you'll have to get
12 the documents from the bank, and produce all documents
13 relevant to your defenses, and if you don't produce them,
14 you can't use them, that's all. That's an easier one.

15 MR. JACOBS: And may I include that language in
16 the order?

17 THE COURT: Pardon?

18 MR. JACOBS: And may I include that inclusionary
19 language in the order, Your Honor, that states that to the
20 extent bank records are produced, the information contained
21 therein --

22 THE COURT: (Indiscernible)

23 MR. JACOBS: -- concerned any offset or tax
24 payment can't be --

25 THE COURT: In the first instance, the bank

1 records should be turned over to Ms. Chaitman. Because now
2 you're talking about her affirmative defenses and she has
3 the obligation.

4 MR. JACOBS: Right.

5 THE COURT: And she should then produce any bank
6 records that relate to any of her defenses. And if she
7 doesn't produce them, you can't use them.

8 MS. CHAITMAN: I have no problem with that. All
9 right, I have no problem with that.

10 MR. JACOBS: It still makes me a little bit
11 uncomfortable, respectfully, Your Honor, because the bank
12 records are just one form of evidence that Ms. Chaitman
13 could be using to pursue --

14 THE COURT: But we're talking about bank
15 subpoenas. This just relates to the bank subpoenas. If the
16 defendants individually have other records, that doesn't --

17 MR. JACOBS: Right, but for example, if Ms.
18 Chaitman is submitting an affidavit from a tax preparer that
19 certain tax payments were made in 2007, I'm entitled to the
20 bank records that would show those funds leaving that
21 defendant's account. That's just one example where that
22 would put back into play the relevancy of those records.

23 THE COURT: But she's got to turn that over. If
24 she doesn't turn over records showing that taxes were paid,
25 how is she going to prove taxes were paid?

1 MR. JACOBS: Right, but there are many forms of
2 proof that a defendant could submit. They could submit an
3 affidavit from a tax preparer that says, "I caused this to
4 be paid." And I would be entitled to test that with an
5 actual bank record from a financial institution showing that
6 payment.

7 THE COURT: But it doesn't give you a bank record
8 showing that the defendant, that, in your example, paid the
9 taxes, I suppose it's possible the accountant paid the
10 taxes, although no accountant is going to do that, so she'll
11 be precluded from using bank records to show she paid the
12 taxes. How else is she going to do it, unless somebody else
13 paid the taxes? I mean, I suppose you could have a husband
14 and wife with separate accounts, and the other spouse could
15 pay the taxes.

16 MR. JACOBS: But there, you know, I'm just noting,
17 there are many forms of evidence. There is oral testimony,
18 there are other witnesses, and --

19 THE COURT: I am not foreclosing other discovery.
20 I'm just saying, this is to resolve this recurring issue
21 with bank subpoenas. It's not precluding you from any other
22 evidence, it just deals with the bank records.

23 MR. JACOBS: No, I understand, but I'm saying that
24 the bank records specifically would be our way of combatting
25 other evidence from a third-party witness, a tax preparer,

1 other documentation.

2 THE COURT: Why don't you give me a specific
3 example of how you think you're prejudiced by this
4 procedure.

5 MR. JACOBS: I just -- I can only give you a
6 theoretical example and I just named one. So a tax preparer
7 at trial gets on the stand and orally testifies that he
8 caused the defendant to pay in taxes X sum of money in 2007.

9 THE COURT: And the defendant hasn't produced any
10 evidence from banks of that payment?

11 MR. JACOBS: Right.

12 THE COURT: At least from banks through the
13 subpoena.

14 MR. JACOBS: Right, or maybe the tax preparer has
15 documents.

16 THE COURT: So you think I'm going to believe that
17 hey paid it if there's no evidence that they paid it?

18 MR. JACOBS: Well, I can't -- I don't presume to
19 predict what Your Honor would do in that circumstance, but
20 all I'm saying is from a Rule 26 perspective, I would be --

21 THE COURT: They would be precluding from using
22 bank records that they don't produce, in response to the
23 subpoena.

24 MR. JACOBS: Right. But I would also be precluded
25 from using the bank records to rebut that evidence, is what

1 I'm saying.

2 MS. CHAITMAN: Your Honor, can I make this very
3 simple?

4 THE COURT: Sure.

5 MS. CHAITMAN: To my knowledge, I may be wrong,
6 and Mr. Epstein can correct me, Mr. Edwards -- I don't
7 believe that the bank records go back more than four to five
8 years.

9 THE COURT: Right, they have to go back to 2003.

10 MS. CHAITMAN: So virtually every client -- maybe
11 there are some exceptions -- but virtually every client got
12 a tax refund for the years 2003 through 2007. So they would
13 have in 2009 received a check from the IRS. Nobody's
14 claiming that they paid taxes that weren't recovered for
15 that period of time.

16 THE COURT: Do you have a problem with that being
17 in the order that you withdraw any defenses to the extent
18 you say that you are entitled to an offset for taxes paid
19 between tax year --

20 MS. CHAITMAN: Yeah, from 2003 on.

21 THE COURT: All right, put that in the order.

22 MS. CHAITMAN: And there are no bank records for
23 that period -- for prior periods. You know what I mean?
24 It's --

25 MR. JACOBS: But, Your Honor, this is not true.

1 Ms. Chaitman is submitting responses in discovery that say
2 exactly the opposite; that tax payments were made for every
3 applicable year that the account was open.

4 THE COURT: But then they got refunds, I thought
5 there was some sort of tax (indiscernible) --

6 MS. CHAITMAN: What I'm saying is that the banks
7 won't have the records for 1994. They --

8 MR. JACOBS: Respectfully, Your Honor, I don't
9 believe the solution to this issue is for me to have to
10 forgo discovery rights. I believe the solution is for Ms.
11 Chaitman to withdraw or amend her affirmative defense to
12 clearly state what she means by it. Because otherwise, I'm
13 forgoing discovery to which I'm entitled to under both Rule
14 45 and Rule 26, and it does tie our hands behind our back
15 when Ms. Chaitman later comes out with proofs or evidence
16 that we're not able to use that discovery we were precluded
17 from.

18 THE COURT: But she can't do it from the bank
19 accounts. If she doesn't produce -- I don't understand the
20 difficulty. Maybe I'm missing something. If she doesn't
21 produce a check or a wire, whatever, that she paid the taxes
22 -- I'm sorry, not she, but the client paid the taxes -- then
23 the defense will fail.

24 MR. JACOBS: But I still would be entitled --

25 THE COURT: Unless it was paid from an account

1 that she never subpoenaed, or it was paid by a third party,
2 as indicated in a husband-wife situation, where there were
3 separate accounts.

4 MR. JACOBS: Right. I understand, Your Honor, but
5 I can only reiterate my example where there's oral
6 testimony, there's other documentation that payments were
7 made that aren't the bank records, that the bank records may
8 contradict.

9 THE COURT: You know, I don't know how many times
10 I can say this. We're just talking about the bank records.
11 I am not talking about other evidence. If you want to take
12 the deposition, if you want to serve document demand, all
13 documents relating to the affirmative defenses, whatever
14 they are, then do that. But this is just with respect to
15 the bank subpoenas.

16 MR. JACOBS: I apologize, Your Honor, I'm not
17 making myself clear.

18 THE COURT: You are making yourself clear.

19 MR. JACOBS: I'm only talking about the bank
20 records, my --

21 THE COURT: We're just talking at cross-purposes.
22 I'm not issuing a broad discovery rule for all discovery in
23 this case. It's just about the bank subpoenas.

24 MR. JACOBS: Respectfully, Your Honor, the bank
25 subpoenas are the most relevant evidence in all of these

1 cases, which are about financial transfers. So I'm only
2 talking about the bank subpoenas as well, and I'm saying if
3 there's an order precluding me from obtaining them, and
4 proof is later put on that payments were made or other
5 disputes concerning any of our obligations, we will be
6 foreclosed from using those bank records to (indiscernible)
7 our case.

8 THE COURT: But why would the bank records show --
9 if I'm saying she's precluded from using them and she
10 doesn't turn them over?

11 MR. JACOBS: Well, I'm saying if an accountant
12 gets on the stand and says there's was a \$1 million payment,
13 I won't be able to have the bank records to show that that's
14 not true. That's the example that I was trying to make.

15 THE COURT: If he says -- if the accountant says a
16 \$1 million payment was made, and a defendant is unable or
17 precluded from producing a record showing that payment, do
18 you think I'm going to believe that that payment was made?

19 MR. JACOBS: I would hope you wouldn't, Your
20 Honor, but to protect our rights, I have to prepare for that
21 possible eventuality, because I can't predict every --

22 THE COURT: So what is it that you propose?

23 MR. JACOBS: I think that I -- what I've said from
24 the very first chambers conference we had in January, Your
25 Honor, if the defendant admits to our Exhibit B, the

1 accuracy of our Exhibit B, which includes the principal cash
2 balance of the account, in addition they admit to receipt of
3 the two-year transfers, and in addition, they withdraw or
4 amend their affirmative defenses, we will withdraw or
5 refrain from serving any bank subpoenas in that case.

6 THE COURT: You're going to have to show me --

7 MR. JACOBS: And that also, I believe, is squarely
8 on point with Your Honor's bench ruling from March 23rd on
9 the motions to quash.

10 THE COURT: But I don't under -- I guess what I
11 don't understand is if I'm precluding them from using bank
12 records that they don't produce to support an affirmative
13 defense, where does that leave you? I mean, why is that
14 result not favorable?

15 MR. JACOBS: Because I'm submitting, respectfully,
16 that I'm entitled to the bank records to defend the
17 affirmative defense. Apart from their affirmative
18 obligation, they do have the affirmative obligation to prove
19 their affirmative defense. I'm still entitled to seek
20 discovery on any facts or evidence that I believe will rebut
21 that affirmative defense.

22 So that's why, apart from whether they decide to
23 produce bank statements or not, I'm still entitled, from a
24 discovery perspective, to those statements, because I can
25 anticipate that someone might get on the stand and say, "I

1 paid \$1 million in taxes on June 12th, 2007." I would want
2 the bank records to prove or deny that.

3 THE COURT: So if the order that we've been
4 talking about said to the extent records are not produced,
5 they will be deemed not to support the defense, is that --

6 MR. JACOBS: That would help.

7 THE COURT: All right, any objection to that?

8 MS. CHAITMAN: No.

9 THE COURT: All right, why don't you draft it, and
10 make it simple.

11 MR. JACOBS: Okay.

12 MS. CHAITMAN: Your Honor, this motion was brought
13 at a time when subpoenas were served in six cases. They've
14 now been served in maybe three.

15 THE COURT: It's the same procedure.

16 MS. CHAITMAN: Can we agree that it will apply to
17 everyone?

18 THE COURT: Well, you know, I -- for that matter,
19 I don't have the complaints before me, but --

20 MS. CHAITMAN: They're all the same.

21 THE COURT: They're going to be resolved along the
22 same line. You know, and I know the devil is in the
23 details, and sometimes what sounds like you're agreeing to
24 here, when you go and read it, at least I remember the
25 responses to all submissions that weren't quite as broad as

1 had been represented to me. If an order says straight up, I
2 agree to basically the trustee's record, putting aside --

3 MS. CHAITMAN: To the accuracy of Exhibit B,
4 right.

5 THE COURT: -- for a period of time, then they
6 can't get the bank records for that period of time, if it's
7 a short period.

8 Somebody says, "I can only agree to the last six
9 months," and the bank has records going back earlier, they
10 can get those. We have this affirmative defense issue,
11 which I hope we've resolved. But I don't see why you can't
12 follow the same procedure in every case.

13 MS. CHAITMAN: Okay, it just --

14 THE COURT: How about a separate order in each
15 case?

16 MR. JACOBS: Thank you, Your Honor.

17 THE COURT: Because you can't -- all of these
18 cases are different, they all have nuances, some are going
19 to have inter-account transfers, I'm assuming, during that
20 period that they're admitting the accuracy. Just deal with
21 it on a case-by-case basis.

22 MS. CHAITMAN: okay.

23 MR. JACOBS: Your Honor, we've already undertaken
24 very similar efforts. We've offered Ms. Chaitman fact
25 transfer stipulations, none of which she's agreed to.

1 THE COURT: I know.

2 MR. JACOBS: The very simple, straightforward way
3 proposed simple admissions to -- broken down by -- to the
4 discrete detail of every transfer and request for
5 admissions, that was not agreed to.

6 We will endeavor to put together a simple proposed
7 order, but it will have to cover all of the issues that we
8 talked about today, and I unfortunately am not optimistic
9 that we won't be back before you in short order fighting
10 about that order, because Ms. Chaitman just has not
11 cooperated with us as to the factual issues in these cases.

12 THE COURT: When can you send your draft order?

13 MR. JACOBS: We could do, for the six cases where
14 Ms. Chaitman's clients have submitted an affidavit, I would
15 propose we start with those and I think that we could put
16 those together in a week's time. It's kind of a weird,
17 strange time right now. A lot of people are out because of
18 the holiday, and I don't want to impose any burdens on
19 people who have time off, so two weeks would be better, but
20 certainly no longer than that.

21 Then the other issue is that going forward, a lot
22 of fact discovery has closed in a lot of Ms. Chaitman's
23 cases, and we're not going to retroactively agree to this
24 type of order in those cases. She's free to admit to
25 disputed factual issues if she wishes, but I don't know why

1 that burden should be on us to have to facilitate that when
2 we already have tried RFAs and fact transfer stipulations.

3 THE COURT: All I'm suggesting is why don't you
4 come up with a form of the order --

5 MR. JACOBS: Right.

6 THE COURT: -- there may be some tinkering in the
7 different cases, but come up with a form of an order. It
8 will apply to each of the cases which seems to solve the
9 bank discovery issue.

10 MR. JACOBS: Right.

11 THE COURT: And if she doesn't agree --

12 MR. JACOBS: I should be --

13 THE COURT: -- depending on what the reason for
14 the disagreement is, maybe get the bank records.

15 MR. JACOBS: I should be in a position to submit
16 that -- to file that with the Court within a week's time, if
17 that's acceptable to the Court.

18 THE COURT: Why don't you provide it to Ms.
19 Chaitman?

20 MR. JACOBS: Okay.

21 THE COURT: Today's the 6th, by the 13th, that's a
22 week from today.

23 MR. JACOBS: Okay.

24 THE COURT: Ms. Chaitman, return it -- how long
25 will you need with the order? We're talking about six

1 cases.

2 MS. CHAITMAN: 24 hours.

3 THE COURT: All right, so provide your response by
4 Friday, July 15th, that's 48 hours, and provide a blacklined
5 copy.

6 MS. CHAITMAN: Sure.

7 THE COURT: And I'll schedule another hearing on
8 this, if necessary, for July 20th, two weeks from today.

9 MR. JACOBS: Okay. And if we are -- hopefully we
10 can reach an agreement, but if we aren't able to reach an
11 agreement, would you like us to file --

12 THE COURT: I don't need anymore. I just have to
13 look at the orders. Just remember we're talking about the
14 bank subpoenas, not some overly-broad order relating to all
15 the discovery in the case.

16 MR. JACOBS: Okay.

17 MS. CHAITMAN: I just want to clarify one thing.
18 Mr. Edwards said, you know, I've been unreasonable in
19 negotiating this. What the trustee's counsel has asked for
20 is an admission that Exhibit B is accurate from 1980 on.
21 I'm not in a position to do that. That was never the issue,
22 Your Honor.

23 THE COURT: I understand.

24 MS. CHAITMAN: Thank you.

25 THE COURT: Okay. Thank you, thank you.

1 (Whereupon these proceedings were concluded at
2 10:50 AM)
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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya

Ledanski Hyde

Digitally signed by Sonya Ledanski Hyde
DN: cn=Sonya Ledanski Hyde,
o=Veritext, ou,
email=digital@veritext.com, c=US
Date: 2016.07.08 10:25:49 -04'00'

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: July 8, 2016